

NO. 94804-6

SUPREME COURT OF THE STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN
WHITEWATER, AND SIERRA CLUB,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND
JAY INSLEE,

Respondents.

**RESPONDENTS' ANSWER TO APPELLANTS' STATEMENT OF
GROUNDS FOR DIRECT REVIEW**

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I. INTRODUCTION

This Administrative Procedure Act (APA) case challenges the validity of WAC 173-557-050, a section of a water management rule that establishes minimum instream flow levels for the Spokane River at 850 cubic feet per second (cfs) during the summer months. Ecology adopted this minimum flow level using the well-established Instream Flow Incremental Methodology (IFIM) to meet the statutory mandate to preserve base flows for instream values under RCW 90.54.020(3)(a). Below, the superior court upheld the Rule and also denied Appellants' Motion to Supplement the Administrative Record.

This case does not satisfy the narrow criteria for direct review under RAP 4.2(a)(4) because Appellants simply failed to satisfy their burden to demonstrate that the Rule exceeds Ecology's authority or is arbitrary and capricious. The record amply demonstrates that the Rule supports all instream values; and while Appellants argue that the Rule violates the public trust doctrine, that issue was long-ago resolved by the court in *Postema v. Pollution Control Hearings Board*, where the court expressly held that the doctrine does not serve as an independent source of authority in the agency's decision-making. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 98–99, 11 P.3d 726 (2000). Finally, the

superior court's decision not to supplement the administrative record scarcely warrants direct review.

II. COUNTERSTATEMENT OF CASE

A. The Spokane River and its Hydroelectric Projects

The Spokane River originates at the outlet of Lake Coeur d'Alene in Idaho and flows west for approximately 111 miles to the Columbia River in Eastern Washington. AR 8062.¹ The river serves recreational activities, such as floating, fishing, wading, sightseeing, or simply enjoying the riparian corridor. AR 2983.

Avista Corporation operates five hydroelectric facilities on the Spokane River, including the Post Falls Hydroelectric Project. AR 8063. This is important to the case because Avista uses its Post Falls Hydroelectric Project to regulate flows in the river, typically for six months a year starting in late June or July. AR 8067.² To change the actual flow in the river to better suit a particular recreational use, one would need to seek changes in Avista's license because the license dictates releases. *Id.*, AR 8058–8224. The Rule does not, and cannot, require release of

¹ Citations are to the Administrative Record (AR) filed with the Court below, which contains Ecology's rulemaking file as well as documents related to Respondent's denial of Petitioners' rulemaking petition. Documents will be cited as "AR" followed by the Bates Number assigned to the corresponding page(s).

² Avista regulates river flows in accordance with minimum flow requirements in its *federal license*, issued by the Federal Energy Regulatory Commission (FERC), which incorporates considerations of lake level, downstream flow, energy demands, flood control, and upstream recreational, residential, and commercial interests. AR 8067.

water from storage. AR 2985. An important misconception regarding instream flow rules is that they physically “put” water in rivers. AR 2798. This is not the case. All an instream flow rule does is establish regulatory flows with a priority date as to other water rights, meaning new uses are subject to the flows and interruptible when the flows are not met. AR 5, 2798; RCW 90.03.247; *see also* AR 3016 (“Flow in the River is controlled largely by discharges from Avista Hydroelectric developments, regulated under the FERC license.”).

Avista’s license requires it to operate the Monroe Street and Upper Falls dams to provide minimum flows of 850 cfs from June 16 to September 30 each year to enhance aquatic habitat for rainbow trout and mountain whitefish in the river. AR 8074. This is *the same flow level* Ecology has adopted in the challenged Rule. Avista’s license also requires it to release flows for whitewater boating from Post Falls Dam. AR 8078.

B. Ecology’s Adoption of the Instream Flow Rule

Ecology has been working with watershed planning groups since 1998 to develop instream flow protection for the Spokane River. AR 2984. Ecology approaches instream flow rules differently in each watershed because each rule area has unique needs. AR 100. Here, for example, development of the Rule is important as it may serve to protect

Washington's interest in the water in the river should an interstate dispute occur with Idaho. AR 63, 72, 3383, 3390.

Ecology formally commenced rulemaking in January 2014. AR 72. Ecology ultimately set summer minimum flows at 850 cfs following a deliberative process and by relying on four scientifically based fish studies, including a study that relied upon the IFIM. AR 3832. Ecology consulted with Dr. Hal Beecher, Washington Department of Fish and Wildlife's lead fish biologist, who concluded that a minimum flow of 850 cfs was necessary to maximize habitat for rainbow trout and mountain whitefish, species of concern in the river. AR 3834. Although Dr. Beecher had earlier recommended higher flows for the lower section of the river, he ultimately revised his recommendation to 850 cfs based upon new studies. AR 3833.

During rulemaking, Ecology received multiple comments from the whitewater boating community and others that disagreed with the decision to set summer flows at 850 cfs, and instead sought a more optimal flow for rafting. AR 3025–3050. While Appellants point to these “thousands” of comments (Appellants' Statement of Grounds for Direct Review (Appellants' Statement) at 3) as some sort of consensus for higher flows, they disregard that the record included comments seeking lower flows,

including from the City of Spokane, which represents over 200,000 citizens. AR 3703.

Regardless, the record reflects not only that Ecology considered all comments, but that the agency's reliance on science-based fish studies to set flows based upon the needs of fish was sufficient to preserve and protect base flows for scenic, aesthetic, and navigational values. AR 3031.³ Indeed, the record includes documents showing one of Appellants' listed counsel in the superior court proceeding below, with others, navigating and recreating on the river in various watercraft at 770 cfs. AR 11590, 11595.

Ecology adopted the Rule on January 27, 2015. The Rule became effective on February 27, 2015. AR 18130. Prior to argument in the case, the superior court denied Appellants' Motion to Supplement the Record with information that was neither in Ecology's custody, nor considered by the agency's rule writing team, during the rulemaking process. Clerks Papers (CP) 161–180.

III. COUNTERSTATEMENT OF THE ISSUES

Appellants' Statement does not satisfy the criteria for direct review under RAP 4.2(a)(4). If the Court accepted review, however, generally stated the issues before the Court would be:

³ As explained below, Ecology is not required to optimize flows for any one constituency when it sets minimum flows by rule.

1. Whether Ecology's decision to set summer flows in the Spokane River at 850 cfs exceeds Ecology's statutory authority, or is arbitrary and capricious.
2. Whether the Supreme Court's decision in *Postema* disposes of Appellants' public trust doctrine argument, and, if not, whether the Rule violates the public trust doctrine anyhow.
3. Whether the superior court manifestly abused its discretion when it denied Appellants' motion to supplement the administrative record.

IV. ARGUMENT AGAINST DIRECT REVIEW

There is no reason why the case should not first be presented to the court of appeals because none of the issues presents a fundamental and urgent issue of broad public import which requires a prompt and ultimate determination by this Court.

A. Ecology's Decision to Set Summer Flows at 850 cfs is Expressly Consistent with the Agency's Statutory Authorities, and Protects All the Instream Values That Must be Preserved

Ecology has exclusive authority for setting minimum instream flows by rule. RCW 90.03.247. Ecology derives its instream flow rulemaking authority from RCW 90.22, the Minimum Water Flows and Levels act, and sections of RCW 90.54, the Water Resources Act.⁴ The Minimum Water Flows and Levels Act provides:

The department of ecology *may* establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds *or*

⁴ RCW 90.54.040 authorizes Ecology to develop and implement by rule a comprehensive statewide water resources program.

other wildlife resources, *or* recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.

RCW 90.22.010 (emphasis added).

RCW 90.22.020 then provides in relevant part, “[f]lows or levels authorized for establishment under RCW 90.22.010 . . . shall be provided for through the adoption of rules.”

Under the plain language of RCW 90.22.010, the Legislature, through its use of the word “or” in the statute, has provided Ecology discretion to determine the purposes for which Ecology sets minimum flows. *C.f. Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (“As a default rule, the word ‘or’ does not mean ‘and’ unless legislative intent clearly indicates to the contrary.”). This makes sense because, as the record explains, each river, or rule area, is unique, thus requiring Ecology to approach rules differently. AR 100.

Here, Ecology exercised its discretion and chose to rely on science-based fish studies to set minimum flows for rainbow trout and mountain whitefish in the Spokane River. AR 3858.⁵

⁵ The Legislature has long-recognized the importance of preserving and protecting fish habitat. See, e.g., (1) RCW 90.54.005, wherein the Legislature recognizes that productive fish populations are one of three critically important water resource objectives; (2) RCW 77.57.020, which states that it is “the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state;” (3) RCW 90.22.060, which calls for establishing a statewide list of priorities for evaluation of instream flows: (“In establishing these priorities, the department shall consider the achievement of wild salmonid production as

Appellants argue that Ecology exceeded its authority because, according to them, the agency's decision to set flows does not protect all instream values. They rely in support of their argument on a provision in the Water Resources Act, RCW 90.54.020(3)(a). Their argument fails for two reasons. First, they err in arguing that this provision requires Ecology to set minimum instream flows at optimum levels. Second, the flow Ecology set actually does protect all instream values by retaining "base flows" that are necessary to preserve them. RCW 90.54.020(3)(a) provides:

The quality of the natural environment shall be protected and, where possible, enhanced as follows:

Perennial rivers and streams of the state shall be retained with *base flows* necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. (Emphasis added.)

Unlike RCW 90.22.010 and RCW 90.22.020, which provide Ecology with some discretion to determine the purposes for which the agency establishes flows by rule, RCW 90.54.020(3)(a) does not mandate that minimum flows must be established by rule for each listed value therein. Instead, RCW 90.54.020(3)(a) requires only that the agency's

its primary goal"); and (4) RCW 90.82.070, part of the Watershed Planning Act, which calls for an assessment that includes "data necessary to evaluate necessary flows for fish," and strategies "to supply water in sufficient quantities to satisfy the minimum instream flows for fish."

water management activities, which include the establishment of minimum flows by rule, also ensure the preservation of base flows for the listed values in RCW 90.54.020(3)(a).

In any case, the record clearly demonstrates that, while the Appellants prefer *enhanced* flows to support recreational, aesthetic, and navigational values, Ecology's setting of flows based upon the needs of fish using the IFIM *also* served to preserve and protect base flows for the listed values in RCW 90.54.020(3)(a).⁶ AR 2985, 2995, 3003, 3009, 3011, 11590, 11595. While Appellants might prefer still higher flows for their preferred activities, the minimum flow of 850 cfs set by Ecology preserves base flows for recreation, aesthetics, and navigation.

Appellants' argument also disregards controlling authority regarding Ecology's use of the IFIM to set minimum flows by rule. *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cty.*, 121 Wn.2d 179, 202–203, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (*Elkhorn*). In *Elkhorn*, the Court affirmed Ecology's use of IFIM as appropriate to establish minimum, and not optimal flows. *Elkhorn*, 121 Wn.2d at 204 (“Ecology’s intent was clearly to preserve, not to enhance, the fishery in the Dosewallips [t]herefore we hold the

⁶ It is noteworthy that RCW 90.54.020(3)(a) requires enhancement of base flows only “where possible.” It is not a requirement to enhance flows for any one use, such as whitewater rafting.

Board's finding that Ecology's [IFIM] instream flow rates are an enhancement flow is clearly erroneous."'). *Id.* Here, Ecology's use of the IFIM to establish minimum flows on the Spokane River is directly consistent with *Elkhorn*, thus weighing against direct review.

In sum, direct review is not warranted because Ecology's decision to set summer flows at 850 cfs is consistent with the agency's statutory authorities and backed by a record that demonstrates that flows at that level preserve and protect base flows for all instream values.

B. Having the Rule in Place Protects Washington in a Potential Dispute with Idaho and Weighs Against Direct Review

Appellants offer the curious argument that direct review is in the public interest "because of the need to protect the instream flow in any future dispute with Idaho over the Spokane River's water." Appellants' Statement at 8. One of the reasons Ecology adopted the Rule, as reflected in the record, is to protect the State's interests in a possible interstate dispute with Idaho over the river or the shared Spokane-Rathdrum Prairie aquifer. AR 63, 72, 3383, 3390.

Appellants are seeking to invalidate that portion of the Spokane Rule that sets summer minimum flows at 850 cfs.⁷ If Appellants are successful in their case, then the river will not have flows in place to

⁷ See RCW 34.05.574, which provides for the type of relief a court may grant in an action brought pursuant to RCW 34.05.570, which includes rule challenges.

protect Washington's interests should there be a dispute with Idaho. Their argument that prompt determination of the case is in the public interest thus makes little sense.⁸

C. As a Matter of Law the Public Trust Doctrine Does Not Apply to Ecology's Instream Flow Rulemaking Activities

Appellants also argue that the Rule and Ecology's interpretation of RCW 90.54.020(3)(a) conflict with the public trust doctrine, a "quasi-constitutional" doctrine that stems from English common law. *See* Appellants' Statement at 10. The Appellants fail to appreciate that rule challenges are governed by the APA. The proper test of rule validity under the APA with respect to this claim is not whether the Rule is invalid because it conflicts with quasi-constitutional, or common law, principles. The proper test is whether Ecology exceeded its statutory authority when it adopted the Rule. RCW 34.05.370(2)(c). For the reasons stated above, it did not. In any event, this Court has already held that the public trust doctrine does not apply to Ecology's water management activities, and

⁸ If Appellants succeed in their case in chief, there is no telling whether or when Ecology would or could recommence rulemaking to adopt a new summer flow for the river, or whether the public rulemaking process would even result in adoption of a new Rule that includes flow levels that are satisfactory to the Appellants. *See Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 507, 39 P.3d 961 (2002) ("[W]e recognize the Department's wide discretion in choosing and scheduling its rulemaking efforts."); *see also Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 745-746, 312 P.3d 766 (2013) (confirming Ecology's discretion to prioritize instream flow rulemaking based on competing demands and limited resources).

because the record demonstrates that the Rule is compliant with the public trust doctrine anyhow, direct review is not warranted.

1. *Postema* precludes Appellants' public trust doctrine argument

The Court long ago ruled that the public trust doctrine does not serve as an independent source of authority for Ecology's decision making. *Postema*, 142 Wn.2d at 98–99 (“Ecology’s enabling statute does not permit it to assume the public trust duties of the state; the doctrine does not serve as an independent source of authority for Ecology to use in its decision-making apart from code provisions intended to protect the public interest.”). Thus, in the context of water resources management, Ecology’s authority is provided in the water resources statutes, including RCW 90.22 and RCW 90.54, and the agency has no independent authority or obligations under the public trust doctrine.

Appellants rely on this Court’s recent opinion in *Chelan Basin Conservancy v. GBI Holding Co.*, 188 Wn.2d 692, 399 P.3d 493 (2017), to argue that the public trust doctrine is a valid basis under which the court may review Ecology’s instream flows. Appellants’ Statement at 10, 11. This reliance is misplaced. Unlike *Chelan Basin*, this case is not a facial challenge to a statute. The Appellants do not assert that the instream flow statutes violate or are inconsistent with the public trust doctrine. Instead,

this case is a rule challenge governed by the APA. Thus, *Chelan Basin* and similar cases, such as *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987), simply do not apply here. Indeed, had Ecology considered the public trust doctrine Ecology would have exceeded its authority as determined by *Postema* and the result would be an invalid rule. Therefore, despite Appellants' arguments, the public trust doctrine simply has no application here and does not provide a basis for direct review.

2. The Rule's 850 cfs summer flow preserves navigation

Appellants' public trust doctrine argument rests on the false assumption that "by allowing water to be withdrawn to a degree that will impair recreational use and navigation, Ecology gives up control over (and arguably will diminish or destroy) the *jus publicum*." See Appellants' Statement at 11.

This hyperbolic argument is *directly* contradicted by the record, which show that 850 cfs is sufficient for the exact recreational activities that Appellants lament. See AR 11590 (multiple watercraft navigating the river at 770 cfs); AR 11595 (Pontoon boat navigating Bowl and Pitcher rapids at 770 cfs); AR 11594 (Tubers navigating the river at 770 cfs). In short, the Rule absolutely preserves navigation.

D. The Superior Court's Decision Denying Appellants' Motion to Supplement the Record Does Not Warrant Direct Review

The superior court denied a motion brought by Appellants to supplement the record under the narrow standards found in RCW 34.05.362. This decision does not warrant direct review. The validity of an agency rule is determined as of the time the agency took the action adopting the rule. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). The rulemaking file required by RCW 34.05.370 constitutes the "official agency rule-making file" for purposes of judicial review. RCW 34.05.370(4).

Here, Appellants sought to supplement the approximately 19,000 page record with *just three* documents. In response to Appellants' motion, Ecology's rule writers attested that during development and adoption they neither possessed nor considered any of the documents that Appellants were seeking to add to the record. CP 167–173. Although Appellants argue that Ecology should have considered these documents, in reality they simply failed to satisfy the narrow standards under RCW 34.05.562 to supplement a record in a case such as this.

This is not a case where Ecology specifically tailored the record to exclude contrary information, as Appellants argue, because an agency cannot exclude information its rule writers do not possess. A superior

court's decision not to supplement the record should be reversed only upon a manifest abuse of discretion. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 65, 202 P.3d 334 (2009). Given this deferential standard, the superior court's decision to exclude Appellants' new evidence does not warrant direct review.

V. CONCLUSION

Based on the foregoing, Respondents respectfully requests the Court to deny the Appellants' request for direct review.

RESPECTFULLY SUBMITTED this 14th day September 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on September 14, 2017, I caused to be served Respondents' Answer to Appellants' Statement of Grounds for Direct Review in the above-captioned matter upon the parties herein via the Appellant Court Portal Filing system, which will send electronic notifications of such filing to the following:

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DATED this 14th day of September 2017 at Olympia, Washington.



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